Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-598

MURRAY H. MICHAEL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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_____

To the Honorable, the Chief Justice and
Associate Justices of the Supreme
Court of the United States.

Murray H. Michael, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on August 17, 1979.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Third Circuit is unreported and is included in the Appendix hereto, infra, pages a1-3.
The judgment of the United States Circuit Court of Appeals, Third Circuit, is included in the Appendix hereto, infra, page a4. The judgment of the United States District Court for New

Jersey is included in the Appendix hereto, infra, page a5.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered on August 17, 1979. A petition for rehearing was denied on September 12, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the District Court erred in instructing the jury that the petitioner could be convicted as a principal of violating 18 U.S.C. § 656.

2. Whether the Court of Appeals abused its discretion by invoking the concurrent sentence rule.

3. Whether the conspiratorial objective alleged by the respondent set forth a criminal misapplication of bank funds.

STATUTES INVOLVED

18 U.S.C. § 2 (App. 6).

18 U.S.C. § 371 (App. 6).

18 U.S.C. § 656 (App. 7).

18 U.S.C. § 1952 (App. 8).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on all counts of a seventeen count indictment (App. 9-44). These seventeen counts involved three different crimes, more particularly described as follows:

(a) COUNT 1: This single count charged the petitioner with conspiracy to misapply bank funds in violation of 18 U.S.C. § 371 (App. 9-15).

(b) COUNTS 2-14: These thirteen counts charged the petitioner with aiding and abetting a bank officer in the misapplication of bank funds in violation of 18 U.S.C. §§ 656 and 2 (App. 16-41).

(c) COUNTS 15-17: These final three counts charged the petitioner with crossing state lines with intent to commit commercial bribery in violation of the Travel Act, 18 U.S.C. § 1952 (App. 42-44).

At the close of all the evidence, the District Court, under the authority of Pinkerton v. United States, 328 U.S. 640 (1946), gave the jury a "derivative liability" instruction, thereby allowing the jury to convict the petitioner of violating 18 U.S.C. § 656 as a principal.

The petitioner was sentenced to seventeen concurrent five-year terms of imprisonment (App. 5). The Court of Appeals affirmed the petitioner's

conviction on Count 1, the conspiracy count, and Counts 2-14, the thirteen aiding and abetting misapplication of bank funds counts (App. 1-3). With regard to Counts 15-17, the Travel Act convictions, the Court of Appeals invoked the concurrent sentence rule and refused to pass upon these three convictions (App. 2-3). The issue involved in these three Travel Act counts, i.e., whether commercial bribery is proscribed by the Travel Act, is presently before this Court on certiorari in the cases of Perrin v. United States, No. 78-959; Levy v. United States, No. 78-5855; and LaFont v. United States, No. 78-5930.

REASONS FOR GRANTING THIS WRIT

1. The petitioner, who is not now, nor has he ever been, a bank officer, was charged in Counts 2-14 of the redacted indictment with aiding and abetting a bank officer in the misapplication of bank funds in violation of 18 U.S.C. § 656 (App. 16-41). By its terms, 18 U.S.C. § 656 may only be violated by the following individuals:

> . . . an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve

> Agent or of the Board of Governors of the Federal Reserve System . . . (App. 7).

A non-bank officer may be validly convicted of conspiring to violate 18 U.S.C. § 656 and/or aiding and abetting the violation of 18 U.S.C. § 656, but this Court and the United States Circuit Court of Appeals for the Third Circuit have held that only a bank officer may be validly convicted of violating 18 U.S.C. § 656 as a principal. United States v. Weitzel, 246 U.S. 533 (1918) and United States v. Tornabene, 222 F.2d 875 (3rd Cir. 1955).

Nonetheless, in the instant case, the trial court gave the jury an instruction which allowed the petitioner to be convicted of violating 18 U.S.C. § 656 as a principal. This instruction was as follows:

> If you find that the conspiracy alleged in Count 1 has been proven, and you find that in furtherance of that conspiracy any co-conspirator committed one or more of the substantive crimes charged in Counts 2-14, then you may find the defendant, Murray H. Michael, guilty of those substantive crimes even if he did not commit them directly. This is so because a conspiracy can be viewed as a partnership in crime and each partner is responsible for the criminal acts of his co-conspirators which were committed in furtherance of the conspiracy (App. 45).

It is not unusual for this instruction to be given in multi-count indictments which contain a conspiracy count alleging that the defendants conspired to commit certain substantive crimes which are also charged in other counts of the same indictment. The instruction originated in Pinkerton v. United States, 328 U.S. 640 (1946), and is based upon the premise that the acts of one conspirator committed in furtherance of the conspiracy are the acts of all conspirators. However, in the instant case, the substantive offenses which the conspirators allegedly conspired to commit are violations of 18 U.S.C. § 656, which may only be violated by a bank officer. Thus, the petitioner may have been convicted of a crime which it is legally impossible for him to commit. After deliberations, the jury foreman simply stated: "Your Honor, we have found the Defendant guilty on all seventeen charges" (App. 46). Thus, the record of this case does not reveal whether the petitioner was validly convicted of violating 18 U.S.C. § 656 as an aider and abettor or invalidly convicted as a principal. This Court and the United States Circuit Court of Appeals for the Third Circuit have ruled that a verdict must be set aside where it is supportable on one ground but not on another, and it is impossible to tell which ground the jury selected. Stromberg v. California, 283 U.S. 359, 367-8 (1931); Cramer v. United States, 325 U.S. 1, 36 n.45 (1945); United States v. Dansker, 537 F.2d 40, 51

(3rd Cir. 1956); and Williams v. North Carolina, 317 U.S. 287, 291-2 (1942).

Accordingly, this Court should grant petitioner's writ in order to decide the important federal question of whether a non-bank officer may be convicted of violating 18 U.S.C. § 656 under the derivative liability doctrine.

2. As stated above, the Court of Appeals affirmed the petitioner's convictions of the single conspiracy count and the thirteen aiding and abetting misapplication of bank funds counts, but invoked the concurrent sentence rule and refused to pass upon Counts 15-17, the Travel Act counts (App. 1-3). Although the invocation of the concurrent sentence rule is a matter of discretion with appellate courts, this Court has stated that a review of convictions is always desirable where "adverse collateral consequences" may flow from an unreviewed conviction. Benton v. Maryland, 395 U.S. 784, 790 (1969).

The issue raised by petitioner in the three Travel Act counts, i.e., whether commercial bribery is proscribed by the Travel Act, is presently being considered by this Court in Perrin v. United States, No. 78-959; Levy v. United States, No. 78-5855; and LaFont v. United States, No. 78-5930. Thus, the likelihood of adverse collateral effects flowing from the petitioner's three unreviewed Travel Act convictions is certainly a possibility since this Court may well rule that commercial bribery

is not proscribed by the Travel Act. Accordingly, the Court of Appeals, knowing that the issue raised by petitioner was already before this Court on certiorari, abused its discretion in invoking the concurrent sentence rule and refusing to pass upon the petitioner's three counts of Travel Act convictions.

3. The conspiratorial objective alleged by the government in Count 1, the conspiracy count, does not set forth a criminal misapplication of bank funds except insofar as it tracks the statutory language of 18 U.S.C. § 656. This Court and the United States Circuit Court of Appeals for the Third Circuit have stated that a factual description of the conspiratorial objective of a given conspiracy is not satisfied merely by tracking the statutory language. United States v. Britton, 108 U.S. 199 (1883) and United States v. Knox Coal Co., 347 F.2d 33 (3rd Cir. 1965).

Thus, this portion of the decision sought to be reviewed is in conflict with decisions of this Court and the Third Circuit Court of Appeals.

CONCLUSION

In view of the vital importance of the question of federal law presented and the other considerations set forth above, it is respectfully submitted that this petition for writ of certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of October, 1979, copies of this Petition for Writ of Certiorari were mailed, air mail postage prepaid to the Solicitor General, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

TANYA M. PLAUT

CERTIFICATE OF ATTORNEY

I, TANYA M. PLAUT, hereby certify that I am a member of the Bar of the United States Supreme Court in good standing and was admitted to practice by the Court on November 6, 1972.

TANYA M. PLAUT
Attorney